IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

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No. 860

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RUSSELL MORTON BROWN, *Petitioner,*

v.

EDWARD OLIVER LAMB AND DISPATCH, INC., a Pennsylvania Corporation, *Respondents.*

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## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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### STATEMENT OF THE CASE

On June 18, 1957, the Petitioner rendered to the Respondents a bill for alleged services rendered as an attorney concerning a certain matter before the Federal Communications Commission (JA 48). From then,

until January 1959, Petitioner repeatedly wrote to Respondents requesting payment of his claim (JA 48-55; 88-101). On January 19, 1959, Petitioner personally discussed his claim with Respondent Lamb (JA 52, 53, 54, and 56). Thereafter, on April 28, 1959, Petitioner commenced a civil action in Lucas County, Ohio, claiming non-payment of the alleged attorney's fees (JA 76). Petitioner, to this day, has refused to move forward with this suit in Ohio. Finally, in May of 1963, six years after the origination of his claim, Petitioner started suit in the District of Columbia, the amount and the claim being identical to the suit in Ohio.

One of the defenses raised by Respondents was the local three year Statute of Limitations (JA 7, 11).

Upon trial of this case, a verdict was rendered in favor of Petitioner. Thereafter, upon motion, the trial court entered judgment *Non Obstente Veredicto,* in favor of Respondent and against the Petitioner, holding that Petitioner had not overcome the bar of the local Statute of Limitations and that Petitioner had so inflamed and prejudiced the jury against Respondents that the verdict was not based upon the evidence. In the alternative the Trial Court granted unto Respondents a new trial (App. 25a, JA 16). The Petitioner appealed to the Circuit Court of Appeals for the District of Columbia, upon the narrow issue of whether the Trial Court weighed the evidence wrongly for the purposes of Rule 50 of the Federal Rules of Civil Procedure. (App. 3a). The Appellant Court affirmed holding that the Trial Court had not erred (App. 1a, 2a, 3a, 4a). Petitioner now alleges that the Court of Appeals erred, not in its superbly written Opinion, but in footnote 4, a statement of dicta, was inconsistent with the Appellate Court's prior decisions.

## REASONS FOR DENYING THE WRIT

### The Court of Appeals' Opinion in Ruling Upon the Requirements of an Equitable Estoppel Which Would Bar Reliance Upon the Statute of Limitations, Is in Conformity With the Decisions of This Court and the Decisions of All the Circuit Courts of Appeal

The Petitioner comes before this Court urging that the Court of Appeals erroneously reviewed the trial record *de novo* and thus created a national issue of imperative public importance. Nothing could be further from the truth.

In the petition, Mr. Brown takes no issue with the Opinion of the Court of Appeals; however, as the disappointed litigant, he finds solace in the dicta of a footnote. Mr. Brown in his petition for a Writ of Certiorari, raises two questions. The first concerns a part of one sentence from the first paragraph of footnote 4 to the Opinion by the Court of Appeals and his second question comes from the second paragraph of that same footnote (414 F 2d 1210 at 1212 N. 4).

Petitioner's initial argument before this Court rests solely upon one part of a sentence lifted completely out of context from the dicta of a footnote. When the footnote is read in conjunction with the Opinion, there is no argument. Petitioner alleges the Court of Appeals, in order to affirm the Trial Court, reviewed the trial evidence *de novo*. This is not true.

> "This appeal is thus narrowly confined to the question of whether the trial court weighed the evidence wrongly for the purposes of Rule 50. Our close reading of the record does not warrant our saying that it did. We note in this regard that appellant's evidence was designed to show that appellant was lulled into inaction by the informal assurances of appellee Lamb which assertedly con-

tinued over a period of several years. But these alleged assurances and requests not to sue were not enough to keep appellant from bringing a suit for the fees in a state court of Ohio in April, 1959, a suit which is still pending. And it seems not unlikely that the three-year further delay in filing suit in the District of Columbia was induced less by Lamb's representations than by appellant's knowledge as a lawyer that he had a precautionary anchor to windward in the form of the Ohio suit. We do not think the District Court erred in concluding that the evidence fell short of showing the element of reliance to the degree required by the doctrine of equitable estoppel.[4]

*Affirmed.*

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[4] Even if it be assumed that the trial court changed its mind about the propriety of its having submitted the estoppel issue to the jury, and granted the motion n.o.v. solely because it eventually embraced the position that § 3504 left no room for the operation of equitable estoppel based on unwritten evidence, the judgment dismissing the complaint should still stand. Such a reading of the statute would be incompatible with the spirit of our prior expressions on this subject, *see* n. 3 *supra,* and with the more persuasive authorities. *See* Albachten v. Bradley, 212 Minn. 359, 3 N.W. 2d 783 (1942). "Among all the spheres of its activity estoppel probably plays no more useful service than the alleviation of hardship caused by statutes of limitation." Dawson, *Estoppel & Statutes of Limitation,* 34 MICH. L. REV. 1 (1935). In the unlikely event that the learned trial court failed to consider the evidence in relation to the estoppel claim because of an erroneous interpretation of § 3504, our own review of the evidence for this purpose establishes its inadequacy to impose an estoppel. No person, especially a lawyer such as appellant here, could reasonably rely on the representations allegedly made by or on behalf of appellees."

Clearly then, the Court of Appeals' Opinion ruled upon the narrow issue of equitable estoppel, and held that the Trial Court had not erred. The footnote merely shows that the arguments, raised by Petitioner on appeal, had no merit.

Petitioner also argues the merits of equitable estoppel as ruled upon by the two courts below:

The Trial Court, upon motion by the Respondents, ordered a Judgment *Non Obstente Veredicto,* in favor of the Respondents, and against the Petitioner. In its order, the Trial Court held:

> ". . . and it appearing to the Court that the Statute of Limitations had run prior to the filing of this action[1], that no evidence was adduced at the trial of a character requisite for taking this action out of the Statute of Limitations,[2] and hence that the motion for Judgment N.O.V. should be granted; . . ." (App. 25a, JA 16, 17) (footnotes omitted)

On appeal, the Petitioner argued, in spite of the language of the lower court's Opinion, that the lower court ignored the question of equitable estoppel. Plainly, the lower court considered the doctrine of equitable estoppel, as why else would its Opinion state "no evidence was adduced at the trial of a character requisite for taking this action out of the Statute of Limitations." (Supra).

On appeal, the Circuit Court of Appeals, also considered this doctrine:

> "We do not think the District Court erred in concluding that the evidence fell short of showing the element of reliance to the degree required by the doctrine of equitable estoppel." (414 F 2d 1210 at 1212).

As to the merits of equitable estoppel, the only evidence presented shows that 22 months after Petitioner rendered a bill for alleged services, he started suit in Ohio (JA 76, 88). Thereafter, 14 more months went by while the parties discussed settlement before the

District of Columbia Statute of Limitations ran (JA 52, 53; 88-101). Finally, three more years passed before Petitioner started suit in the District of Columbia (JA 3, 4, 5). Naturally, Petitioner raised the local Statute of Limitations (JA 7, 11), which in explicit language provides:

> "In an action upon a simple contract, an acknowledgement or promise by words only is not sufficient evidence of a new or continuing contract whereby to take the case out of the operation of the Statute of Limitations or to deprive a party of the benefit thereof *unless the ackowledgement or promise is in writing, signed by the party chargeable thereby.*" (1967 D.C. Code Sec. 28-3504) (Emphasis supplied)

Petitioner has never claimed there was any such writing and, in fact, there is none. However, Petitioner, in an attempt to save his case, claimed the doctrine of equitable estoppel prevented Respondents from raising the Statute of Limitations.

The wording of the Statute of Limitations is clear and precise and exactly on point with the issue here raised. The Statute ran, there was no writing, and, therefore, Petitioner's claim was impotent. It is also clear that the history of the Statute of Limitations carried with it the doctrine of equitable estoppel. That is to say, the Statute of Limitations shall govern, unless there has been some fraud, accident, or mistake that would make it unconscionable to allow the Statute to prevail. Here there was no mistake. Petitioner, an able and admittedly august attorney, certainly cannot claim he did not know of such a statute (JA 32, 39). There was no mistake, as Petitioner had already started suit in Ohio. As the Appellate Court so colorfully

stated, "He (Mr. Brown) had a precautionary anchor to windward in the form of the Ohio suit." (414 F 2d 1210 at 1212). Certainly it is plainly clear that there was no fraud.

In the absence of fraud or some unusual circumstance, the Courts have uniformly held that a writing is required acknowledging the indebtedness in order to stay the running of the Statute. *Hornblower* v. *George Washington University,* 31 App. D.C. 64, 75 (1908); *Howard University* v. *Cassell,* 75 App. D.C. 75, 81, 126 Fed(2d) 6 (1941); *McCloskey* v. *Dickanson,* 56 Atl. (2d), 442, 76 W.L.R. 146 (1947); *Fontar* v. *Aetna Casualty and Surety Company,* 124 U.S. App. D.C. 168, 363 Fed (2d) 297 (1966).

If in fact the type of discussion had by the parties (JA 88-101) were sufficient to take the case out of the Statute of Limitations, then surely, the Statute of Limitations would be completely emasculated. Therefore, the two courts below should be sustained and the Writ denied.

**In Holding That Burnett v. New York Central Ry. Co., 380 U.S. 424, 428 (1965) Was Not Applicable to This Case, the Court of Appeals Is Not in Any Conflict With Any Other Jurisdiction**

Petitioner argues in his petition that the Court of Appeals erred in not applying the Doctrine set out in *Burnett* v. *New York Central Ry. Co.,* 380 U.S. 424, 428 (1965), because it is an F.E.L.A. case (See Petitioner's Brief p. 17). Petitioner bases his argument upon the second paragraph of footnote 4 of the Opinion of the Court of Appeals:

> "We have also considered and find without merit the appellant's contention that the judgment n.o.v. should be reversed on the ground that the D.C. statute of limitations was tolled by the filing

> of the suit in Ohio. Burnett v. New York Central R.R. Co., 380 U.S. 424 (1965) is inapposite because (1) this is not an FELA case; (2) the Ohio suit filed by appellant was not dismissed on grounds of improper venue; and (3) appellant filed his D.C. suit more than three years after he filed in Ohio—in *Burnett* the plaintiff filed within eight days of the dismissal of the Ohio suit." (414 F. 2d 1210 at 1212 n. 4.)

For some reason, Petitioner ignores the other reasons given by the Court of Appeals.

As Petitioner said in his petition (See Petitioner's Brief, page 18):

> "This court held that following dismissal of the state court action, *a prompt refiling* in the Federal court was not barred by limitations, though the actual period named in the Statutes had run." (Emphasis Supplied)

Petitioner did not file promptly. Petitioner filed his claim in the District of Columbia six years after his claim matured and 34 months after the local Statute of Limitations had run, certainly this was not prompt. Further, the suit in Ohio was not dismissed, it was lying dormant because Petitioner refused to move forward. There was no defect in the Ohio suit, it was a proper forum; however, Petitioner preferred not to litigate his claim in Ohio. Therefore, should Petitioner be able to claim his plight is akin to the situation in *Burnett* v. *New York Central Ry. Co.* (Supra)? Since Petitioner's predicament has been caused by himself, it is suggested that *Burnett* v. *New York Central Ry. Co.* has no application.

Finally, it is abundantly clear that Petitioner exaggerates when he interprets the Opinion of the Court of

Appeals. When the Court said this is not an F.E.L.A. case, they were giving but one of three reasons why *Burnett* v. *New York Central Ry Co.* was not relevant nor applicable to the case at hand.

Respondents are frank to admit that, in certain cases, the Statute of Limitations should be tolled where suit has been started in a State Court and very promptly thereafter is re-initiated in Federal Court, even though the Statute of Limitations has run in the Federal suit. However, this should not be the case where a plaintiff initiates suit in a jurisdiction where service can be made, and then sits back waiting for almost 4 years until the unwary defendant happens to physically come into a jurisdiction more to the liking of the plaintiff. Certainly, the Statute of Limitations has a function to prevent stale claims, and to have contested matters litigated while the evidence is at hand. It just as certainly was not intended to aid a plaintiff who is reluctant to try a claim in one court until he can obtain service of process in what appears to be a more favorable tribunal.

**The Right of Trial by Jury Has Not Been Encroached Upon**

Petitioner asks this Court to reverse the Trial Court because Petitioner alleges that the function of the jury was encroached upon. (See Petitioner's Brief, pages 5 and 6). Respondents suggest that the Trial Court acted properly when, after granting Judgment N.O.V., it gave Respondents, in the alternative, a new trial (JA 16, 17). The reason as stated in the Opinion, for the new trial was the conduct of Petitioner in trying his case. Petitioner did not try the issue of whether or not a fee was due to him, but instead tried the issue of whether or not his former client was a communist. This

unwarranted behavior by Petitioner, certainly, at the very least, should entitle Respondents to a new trial.

## CONCLUSION

There has been shown no conflict with any Statute or applicable principle of law. There has been shown no issue of imperative national importance. There has only been shown a strained and unnatural interpretation of the Opinion of the two lower courts. For these reasons and those above argued, the Petitioner should be denied his Writ of Certiorari. Respondents so pray the Court in the case at bar.

Respectfully,

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